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No. 84-639

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CLARK B. GATHERCOLE,
Petitioner,

VS.

GLOBAL ASSOCIATES,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petition's "Question Presented" distorts the factual and legal issues in the case. The actual "Question Presented" is:

> Whether the Court of Appeals correctly held that where a Federal regulatory requirement enforced by the Department of the Army required respondent—a government contractor which provides air transportation services at the Army's Kwajalein Missile Range—to retire its airline pilots at age 60, respondent acted lawfully under the Age Discrimination in Employment Act ("ADEA") in retiring an airline pilot at age 60.[1]

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[1]Respondent, Global Associates, is a joint venture of Owl Constructors, a corporation, and International Atlas Services, which is a subsidiary of Atlas Corporation. Global Associates has one subsidiary, Global Associates International Limited. All of these entities are privately owned.

TABLE OF CONTENTS

	Page
Question presented	i
Preliminary statement	1
Statement of the case	2
Reasons why the petition should not be granted	4
A. The petition presents a narrow and unique issue that does not merit review by this Court	4
B. The Court of Appeals correctly held that Global is not liable under ADEA	5
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases

	Page
Air Line Pilots Ass'n v. Trans World Airlines, 713 F.2d 940, certiorari granted sub nom. TWA v. Thurston, ... U.S. ....., 52 U.S.Law Week 3631, and Air Line Pilots Assn. v. Thurston, ... U.S. ....., 52 U.S.Law Week 3720	8
Air Lines Pilots Association, International v. Quesada, 276 F.2d 892, certiorari denied 366 U.S. 962	4
Criswell v. Western Airlines, Inc., 709 F.2d 544, certiorari granted ..... U.S. ....., 53 U.S.Law Week 3235	8
Dothard v. Rawlinson, 433 U.S. 321	8
E.E.O.C. v. County of Los Angeles, 706 F.2d 1039, certiorari denied ..... U.S. ....., 52 U.S.Law Week 3534	8
Gray v. Federal Aviation Administration, 594 F.2d 793	4
Houghton v. McDonnell Douglas Corp., 627 F.2d 858....	8
Keating v. Federal Aviation Administration, 610 F.2d 611	4
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702	8
Monroe v. United Air Lines, Inc., 736 F.2d 394	8
Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, certiorari denied ..... U.S. ....., 52 U.S. Law Week 3422	8
Rombough v. Federal Aviation Administration, 594 F.2d 893	4
Smallwood v. United Air Lines, Inc., 661 F.2d 303, certiorari denied 456 U.S. 1007	8

Table of Authorities Cited

Cases

	Page
Starr v. Federal Aviation Administration, 589 F.2d 307	4
Tuohy v. Ford Motor Co., 490 F.Supp. 258, reversed 675 F.2d 842	7

Statutes

Administrative Procedure Act, 5 U.S.C. § 551, et seq.	4
5 U.S.C. § 702	4
5 U.S.C. § 704	4
Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. § 621, et seq.	i, 1, 4, 5, 6
29 U.S.C. § 623(f)	5
29 U.S.C. § 628	6
49 U.S.C. 1421(b)	2

Regulations

Code of Federal Regulations	
29 C.F.R. § 860.102(c)	3
29 C.F.R. § 860.102(d)	3, 6

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PRELIMINARY STATEMENT

Petitioner has not set forth a single ground for the granting of certiorari that merits serious consideration by the Court. The Petition for Certiorari presents no important question of law; rather, it seeks review of a narrow question regarding liability under the Age Discrimination in Employment Act ("ADEA"). The decision below has applicability only in those rare instances where a Federal regulatory requirement imposes an age limitation on the defendant's employees. Nor is there a conflict among the Circuits on the question presented.

The decision of the Court of Appeals is clearly correct in holding that petitioner could not recover against respondent, Global Associates ("Global"), for merely complying with a Federal regulatory requirement that governs its flight operations. There is no need for the Court to review that decision.

STATEMENT OF THE CASE

Petitioner's statement of the case is laden with numerous misstatements of the evidentiary record before the Court of Appeals. The essential facts contained in the record are set forth below.

Global provides air transportation services for the United States Department of the Army at the Kwajalein Missile Range ("KMR"), a military installation in the South Pacific maintained by the Army's Ballistic Missile System Defense Command for the testing of intercontinental ballistic missiles and other military equipment.

Regulatory jurisdiction over Global's airline flights at KMR is vested in the United States Department of the Army. While the Federal Aviation Administration ("FAA") regulates virtually all domestic air carriers, Global's Army-authorized flights in Army-owned aircraft at KMR are subject to the Department of the Army's regulatory jurisdiction, not that of the FAA.[2] Both the FAA and the Department of the Army are charged with the responsibility for insuring the "highest possible degree of safety in the public interest" for passenger flights under their respective jurisdictions (see 49 U.S.C. § 1421(b)).

The Department of the Army exercised its regulatory jurisdiction in November 1973, when it authorized certain aviation services to support military operations at KMR and established regulatory requirements governing those aviation operations in a published document entitled "Scope

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[2]As the Court of Appeals noted, it is undisputed that the Army has plenary authority to regulate aviation safety at KMR (Pet. Appx. 14a; see also pp. 181, 186 of the Excerpt of Clerk's Record before the Court of Appeals, hereinafter cited as "ER, pp. ." References to the Reporter's Transcript are hereinafter cited as "RT, pp. .").

of Work, Logistic Support, Kwajalein Missile Range" (Pet.Appx., p. 14a; ER, pp. 155-172). In the Scope of Work, the Department incorporated by reference several hundred FAA flight safety regulations, including the FAA's requirement for mandatory retirement of airline pilots at age 60 ("age-60 rule")—a requirement that the FAA implemented and maintains to promote passenger safety within its regulatory jurisdiction (Pet.Appx., pp. 14a-15a; 29 C.F.R. §§ 860.102 (c), (d)).

Petitioner piloted Army-authorized airline type flights between the islands at KMR in support of the Army's military operations.[3] When petitioner reached the age of 60, Global terminated his employment pursuant to the regulatory requirement enforced by the Department of the Army which prohibited Global from using pilots age 60 and older.

Prior to his discharge, plaintiff requested that the Department of the Army waive its age-60 rule so that he could continue flying at Kwajalein. The Department specifically declined to do so and stated that the rule would be enforced "for reasons of safety in air transportation at the Kwajalein Missile Range" (ER, p. 180).[4]

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[3]These flights transported approximately 350 Army-authorized passengers per day, including Congressmen, top military officials, defense experts, foreign dignitaries, military personnel, civilian workers and other authorized persons (see RT, pp. 221-224).

[4]Having ruled that Global is not required to justify the Federal regulatory requirements which govern its operations, the Court of Appeals had no occasion to reach the medical evidence which supports the age-60 flight limitation for pilots. However, contrary to petitioner's mischaracterizations (Pet., pp. 13-14), the uncontroverted record establishes that the increased risks of unpredictable cognitive and cardiovascular defects for pilots age 60 and older

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

A. The petition presents a narrow and unique issue that does not merit review by this Court.

The Department of the Army regulated Global's airline operation at KMR and prohibited Global from employing airline pilots age 60 and older (Pet.Appx., pp. 7a, 13a-15a). The Court of Appeals held only that Global did not violate ADEA by complying with a safety requirement the Federal government has imposed on its airline operation (Pet. Appx., pp. 11a-12a). The decision, moreover, in no way insulates such Federal regulatory requirements from direct challenge at the agency level under the Administrative Procedure Act (5 U.S.C. §§ 702, 704).[5]

Thus, far from having the broad sweep petitioner suggests, the decision relieves employers from ADEA liability only in those rare instances where a Federal authority has imposed an age limitation that directly applies to the defendant's employees (Pet.Appx., pp. 13a-15a). With respect to private sector employees, the only other example of such a Federal regulatory requirement of which we are aware is the FAA's age-60 rule for airline pilots within its jurisdiction.

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justify a mandatory age 60 retirement rule (RT, pp. 178, 284-286, 301-303, 308-311, 326-333, 352-353; ER, pp. 173-174).

[5]See, *Keating* v. *Federal Aviation Administration* (9 Cir. 1979) 610 F.2d 611; *Rombough* v. *Federal Aviation Administration* (2 Cir. 1979) 594 F.2d 893; *Gray* v. *Federal Aviation Administration* (10 Cir. 1979) 594 F.2d 793; *Starr* v. *Federal Aviation Administration* (7 Cir. 1978) 589 F.2d 307; *Air Lines Pilots Association, International* v. *Quesada* (2 Cir. 1960) 276 F.2d 892, certiorari denied (1961) 366 U.S. 962. We are aware of no case in which a pilot has been allowed to circumvent the Administrative Procedure Act and challenge the Federal age-60 rule vicariously by suing a regulated airline.

B. The Court of Appeals correctly held that Global is not liable under ADEA.

ADEA's bona fide occupational qualification ("BFOQ") exemption provides:

> "It shall not be unlawful for an employer * * *—
> "(1) to take any action [based on age] * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *" (29 U.S.C. § 623(f)).

The Court of Appeals correctly held that where, as in this case, an employee is retired pursuant to a Federal regulatory requirement, the Federal requirement is a "bona fide occupational qualification" which precludes liability of the employer under ADEA (Pet.Appx., pp. 10a-15a). In reaching this result, the Court of Appeals properly focused on the Scope of Work, the official regulatory requirements the Army established for its Kwajalein airline prior to awarding the aviation services contract to Global (Pet. Appx., pp. 12a, 14a). Petitioner's attempt to simply ignore the Department of the Army's regulatory action and focus exclusively on Global's subsequent contract with the Army (Pet., pp. 19-20) is plainly unavailing. Given the Department of the Army's undisputed implementation and enforcement of the age-60 rule, petitioner's repeated references to "Global's [age-60] policy" or "[Global's] age limitation" (Pet., pp. 9, 23) merely underscore the fallacious premise upon which the entire petition is based.[6]

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[6]Petitioner also erroneously implies that the Department of the Army was somehow required to adopt an age-60 rule covering all types of Army and contractor pilots (Pet., p. 28). The only inquiry relevant to the BFOQ issue here, however, is that the Department of the Army applied the age-60 rule to Global's airline pilots, including petitioner (see Pet.Appx., p. 7a).

The Court of Appeals correctly recognized that ADEA does not penalize employers who are bound by Federal safety requirements. This sound conclusion is fully consistent with the Department of Labor's interpretation of ADEA,[7] which declares that the BFOQ exemption includes:

> "*Federal* statutory and *regulatory requirements* which provide compulsory age limitations for * * * retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public" (29 C.F.R. § 860.102(d); emphasis added).

Notwithstanding petitioner's erroneous contentions (Pet., pp. 28-29), the Court of Appeals properly discerned the two undisputed facts the regulation calls for: (1) Global retired petitioner pursuant to an applicable Federal regulatory requirement; and (2) the United States Department of the Army imposed its age-60 rule for the purpose of promoting passenger safety (Pet.Appx., pp. 14a-15a).

Similarly, petitioner's tortured construction of the Department of Labor regulation is simply an attempt to read out of the regulation the BFOQ based on "'federal statutory and regulatory requirements'" (Pet., pp. 26-27). His erroneous interpretation would require regulated employ-

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[7]Congress delegated broad authority to the Department of Labor to interpret ADEA, providing:

> "[T]he Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as he may find necessary and proper in the public interest" (29 U.S.C. § 628).

The enforcement responsibility for ADEA was transferred from the Department of Labor to the Equal Employment Opportunity Commission on July 1, 1979.

ers to prove the validity of the Federal statutory and regulatory requirements that govern their operations—an absurd result which has no basis in law, reason or the language of the Department of Labor's regulation.[6]

Petitioner's further contention that the Court of Appeals' decision conflicts with *Tuohy* v. *Ford Motor Co.* (6 Cir. 1982) 675 F.2d 842 (Pet., pp. 24-25) is patently erroneous. Unlike the case at bar, the pilot retirement policy at issue in *Tuohy* was not a Federal regulatory requirement but a *voluntarily adopted* policy of the employer. While Ford's air operations were within the FAA's regulatory jurisdiction, the FAA had *not* applied its age 60 rule to Ford's noncommercial corporate air operations (*Tuohy* v. *Ford Motor Co.* (E.D.Mich. 1980) 490 F.Supp. 258, 259-260, reversed (6 Cir. 1982) 675 F.2d 842). The Sixth Circuit held only that summary judgment for Ford was improper because there was no Federal age limitation that applied to Ford's flight operations (675 F.2d at 845).

In attempting to draw an untenable analogy to *Tuohy,* petitioner erroneously implies that the FAA has declined to apply its age-60 rule to Global's pilots (Pet., pp. 16-17). It is, however, undisputed that the FAA simply has no jurisdiction to regulate Global at all (see Pet., p. 18), and that the Department of the Army—the Federal agency that does have such jurisdiction—has specifically required Global to comply with the age-60 rule (Pet.Appx., pp. 13a-15a). Under these circumstances, *Tuohy* is plainly inapposite. Petitioner's citations to numerous other Federal cases, *none of which involved a Federal regulatory requirement*

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[6]*None* of the cases plaintiff cites (Pet., p. 27, n. 4) involved an applicable Federal regulatory or statutory requirement.

that applied to the terminated employee (Pet., pp. 21-23), are inapposite and unavailing for the same reason.[9]

Finally, there is no basis for plaintiff's contention that Global acted on some economic self-interest or illicit customer preference for younger employees (Pet., pp. 30-32). As the Court of Appeals rightfully stressed in rejecting these arguments, Global acted pursuant to an applicable regulatory requirement imposed by a Federal agency (Pet.Appx., pp. 13a-15a).[10]

Given these circumstances, the Court of Appeals properly held that Global terminated petitioner pursuant to a bona fide occupational qualification (Pet.Appx., pp. 10a-12a).

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[9]See, *Dothard* v. *Rawlinson* (1977) 433 U.S. 321; *Smallwood* v. *United Air Lines, Inc.* (4 Cir. 1981) 661 F.2d 303, certiorari denied (1982) 456 U.S. 1007; *Houghton* v. *McDonnell Douglas Corp.* (8 Cir. 1980) 627 F.2d 858; *Monroe* v. *United Air Lines, Inc.* (7 Cir. 1984) 736 F.2d 394; *Criswell* v. *Western Airlines, Inc.* (9 Cir. 1983) 709 F.2d 544, certiorari granted (U.S.S.Ct. Oct. 1, 1984) ... U.S. ..., 53 U.S.Law Week 3235; *Air Line Pilots Ass'n* v. *Trans World Airlines* (2 Cir. 1983) 713 F.2d 940, certiorari granted sub nom. *TWA* v. *Thurston* (U.S.S.Ct. Feb. 27, 1984) ... U.S. ... , 52 U.S.Law Week 3631 and *Air Line Pilots Ass'n.* v. *Thurston* (U.S.S.Ct. Apr. 2, 1984) ... U.S. ... , 52 U.S.Law Week 3720.

Moreover, unlike *Air Line Pilots Ass'n.* v. *Trans World Airlines* and *Criswell* v. *Western Airlines, Inc.*, supra, the instant case does not raise any issue as to whether disqualified pilots should be allowed to bid down to flight engineer positions (see Pet.Appx., p. 7a).

[10]Petitioner again erroneously attempts to rely on cases in which there was no Federal regulatory requirement mandating termination of the employee (Pet., p. 31; *E.E.O.C.* v. *County of Los Angeles* (9 Cir. 1983) 706 F.2d 1039, certiorari denied (U.S.S.Ct. Jan. 16, 1984) ... U.S. ..., 52 U.S.Law Week 3534; *Smallwood* v. *United Air Lines, Inc.* (4 Cir. 1981) 661 F.2d 303, certiorari denied (1982) 456 U.S. 1007; *Orzel* v. *City of Wauwatosa Fire Dept.* (7 Cir. 1983) 697 F.2d 743, certiorari denied (U.S.S.Ct. Nov. 28, 1983) ... U.S. ..., 52 U.S.Law Week 3422; *Los Angeles Dept. of Water & Power* v. *Manhart* (1978) 435 U.S. 702).

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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